A Hollow Threat

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On 10 June, the European Parliament passed a resolution on the application of the Conditionality Regulation. In it, it recalls its resolution of 25 March earlier this year where it requested the Commission to adopt the guidelines for the application of the regulation by the first of June. Already in March, the Parliament noted that "[i]n case the Commission does not fulfil its obligations under this Regulation and does not provide Parliament with information as mentioned above by 1 June 2021, Parliament will consider this to constitute a failure to act and subsequently shall take action under Article 265 of the TFEU against the Commission." In its June follow up resolution, the Parliament noted its disappointment with the Commission failing to meet the deadline of 1 June and stressed "that this constitutes a sufficient basis for taking legal action against the Commission under Article 265 TFEU." It further instructed the President of the Parliament to invite, within two weeks of the adoption of the resolution, the Commission to act under Article 265 TFEU in order to force the Commission "activate[s] the procedure laid down in the Rule of Law Conditionality Regulation in the most obvious cases of breaches of the rule of law in the EU."

The June resolution was welcomed by many and even qualified as historical. However, in their enthusiasm many commentators seem to overlook that the very peculiar 'action for failure to act' set out in Article 265 TFEU is not an appropriate procedure to solve the problem at issue. Therefore, the Parliament's threat to initiate an action for failure to act largely rings hollow. This post thus elaborates on the doubts expressed previously by Platon on *Verfassungsblog* and further argues that the Parliament should employ the more political means at its disposal to tackle a problem that is ultimately political in nature.

The action for failure to act – a peculiar and rarely used procedure

The purpose of the action for failure to act is to sanction an illegal abstention to act. Comparing it briefly to the action for annulment, it immediately becomes clear why EU lawyers are much more familiar with the latter. Using the search form on the Curia website, we learn that the EU Courts have delivered 7853 judgments pursuant to an action for annulment, of which 1952 were upheld. By contrast, those same Courts have only delivered 460 judgments under an action for failure to act of which only 13 were upheld. This results in a success rate of only 2,8 percent.

The reason why so few Article 265 TFEU cases are brought and why so few are successful has to do with the high threshold to be met and explains why also the action that the Parliament might bring *in casu* will in all likelihood be unsuccessful. In a nutshell, Article 265 TFEU merely requires EU institutions to define their position and further does not simply target any abstention to act but only those that are

illegal. A defendant party must have omitted to define its position after having been invited to do so and a party bringing an action for failure to act must show that there was an obligation to act for the defendant.

The Commission's options

How would that play out in the case at hand? The Commission essentially has four options when it receives the Parliament's invitation to act: (i) it can stay silent, in which case Parliament can pursue the Article 265 TFEU procedure before the Court of Justice (which is competent pursuant to Article 51(b) of the Statute); (ii) it can claim that it is still working on the guidelines before it can apply the regulation but this would also allow the Parliament to go to Court since under established case law such a reply cannot be considered as the Commission 'defining its position' in the sense of Article 265 TFEU (see Gestevisión Telecinco SA v. Commission, para. 88). Such a reply does not end the abstention to act, leaving the route to the Court open; (iii) the Commission can act on the invitation of the Parliament and start the procedure of Article 6 of the regulation, in which case the Parliament achieved its aim; finally (iv) the Commission could also adopt a position to the effect that it does not consider all the conditions of the regulation fulfilled. In this fourth scenario, the Parliament will not get what it wants but it will not be able to pursue the case before the Court anymore either since the Commission will have defined its position. That position would not consist of a binding act either, meaning also an action for annulment against the Commission's position would be inadmissible (see Lenaerts, Maselis & Gutman, para. 8.19).

Would the Commission's failure to act be illegal?

In scenarios (i) and (ii), the Parliament and Commission could end up facing each other before the Court of Justice, but here a seemingly insurmountable hurdle presents itself. To be clear, the problem here is not that the Parliament is asking the Commission to adopt a preparatory act which cannot be challenged under Article 263 TFEU. Indeed, the Parliament would invite the Commission to start the procedure under Article 6 of the regulation that may culminate in an implementing decision of the Council and these type of preparatory acts can very well form the subject of an action for failure to act if they are a necessary procedural step in a procedure leading to the adoption of a binding act (see Szomborg v. Commission, para. 19). That is the case here.

The problem instead is that the Parliament will find it difficult to show to the Court that the Commission *illegally* abstained from acting, i.e. that the Commission was under a clear and precise obligation to act and could not choose not to act or to act differently from how the Parliament wants it to act. Regardless whether under Article 265 TFEU this question should be assessed in terms of the admissibility or the merits of the action (compare the General Court in Ladbroke Racing Ltd v. Commission vs AG Gordon Slynn in Tradex v. Commission, more extensively, see Safia Cazet, *Le recours en carence*), the Parliament will have to demonstrate that there was this obligation.

Given the terms and scheme of the regulation this is highly unlikely. Article 4 indeed uses mandatory language: “Appropriate measures *shall* be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.” While the verb shall clearly lays down an obligation, the latter only arises ‘where breaches are established pursuant to Article 6’ and only if there is a serious risk that the EU budget is affected or if the EU’s financial interests are sufficiently directly impacted. Article 5 further provides that where the conditions of Article 4 are fulfilled, appropriate measures *may* be adopted in accordance with Article 6. Finally the latter Article does not impose any clear obligation on the Commission since it instructs the Commission (while in a mandatory way using the verb shall) to start a procedure by sending a written notification to the Member States concerned ‘where *the Commission finds* that it has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled […] unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively.’ The leeway available to the Commission is clear: the obligation incumbent on it depends on the Commission itself finding that the conditions of the regulation have been met and even if the conditions are met it may still decide that other procedures (than those of the conditionality regulation) may be more effective in protecting the EU’s budget and financial interests.

The need to show a manifest error of assessment

The overall scheme that transpires from these Articles is that there is an obligation to undertake action under certain conditions but that it is the Commission that has to determine first whether those conditions are met and secondly, once it finds they are met, choose the most appropriate course of action. This is therefore not comparable to a clear cut failure to act in those cases where EU institutions have a circumscribed power and where there is a ‘clearly defined’ obligation to act (see Parliament v. Council, para 64). A recent example of this is the Sweden v. Commission where the latter had failed to adopt a delegated act setting out the conditions under which active substances could be authorized, even if the legislative Biocides regulation explicitly required it to adopt such an act before 13/12/2013. Clearly that failure is incomparable to the alleged failure to act in casu, where the Commission has a margin of discretion. Admittdely, even this margin has its limits, but it is then up to the Parliament to show that the Commission manifestly errs (by analogy, see Camar & Tico v. Commission, para. 149) when it finds that there are no ‘reasonably grounds to consider that there is a rule of law breach’ in a given Member State or that the Commission manifestly errs when it holds that there is indeed a rule of law breach but that other procedures may be more effective or that there is an insufficient risk or impact on the EU’s budget or financial interests. Is the Parliament bluffing or is it really so sure that it can convince the Court of such a manifest error that the Court would venture in this sensitive area, especially considering the alternatives which the Parliament has (or had) to put pressure on the Commission?

Alternative solutions to political theatrics in Court

Observers familiar with the coming into being of the regulation will know that the Parliament let an opportunity slip when it decided against bringing an action for annulment against the European Council Conclusions of December last year (see the analysis by Alemanno and Chamon and Alemanno). Now, what's done is done but the Parliament has further, more political, means at its disposal to tackle a problem that is ultimately political in nature: in most legal systems, when the legislative branch finds that the executive fails to properly implement or apply its legislation, it will use mechanisms of political accountability to achieve its objectives.

It is these types of mechanisms which the Parliament should resort to instead of engaging in political theatrics: launching a procedure before the Court allows the Parliament to pretend it is serious about the rule of law but amounts only to a façade. As set out above, the Parliament's case has limited to no prospect of success in Court. Assuming the case ever reaches the stage of a verdict of the Court we are two years onwards and the Court will have ruled on Poland and Hungary's cases against the regulation, the Commission will have adopted its guidelines and possibly already have launched an Article 6 procedure (which would mean the case will have lost its purpose, see The Liberal Democrats v Parliament).

In short, if the Parliament is serious about the Commission's inertia, it uses the mechanisms at its disposal that allow for immediate action. As the Parliament noted itself in its March and June resolutions it has the right to vote on a motion of censure of the Commission pursuant to Article 234 TFEU. As a prelude, or less drastic, it could avail itself of the possibility created under point 5 of the 2010 Framework Agreement between the Parliament and Commission, whereby the Commission President will seriously consider whether to request a Member of the Commission to resign when asked to do so by the Parliament. The Parliament could put pressure on Commission President Von der Leyen by making such a request in relation to Commissioners Reynders, Jourová and Hahn. These alternatives are much more drastic than an Article 265 TFEU procedure, true. But they are political mechanism to tackle a political problem and they are much more effective and less time-consuming than an action before the Court. They would show that the Parliament serious about the rule of law, instead of initiating seemingly unviable cases before the Court that only serves to hide its ineffectiveness behind a façade of political bravado.
